IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 13080 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GUJARAT WATER SUPPLY & SEWERG.BOARD

Versus

SK RAYJADA

Appearance:

1. Special Civil Application No. 13080 of 2000

MR HS MUNSHAW for Petitioner No. 1

RULE SERVED for Respondents No. 1-2

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 16/03/2002

ORAL JUDGEMENT

Heard learned advocate Mr. Munshaw for the petitioner. Notice of rule issued by this Court has been served upon the respondent but the respondents have not

remained present before this Court either in person or through any advocate. Hence the matter has been taken up for hearing in their absence.

In this petition, the petitioner has challenged the award dated 2.5.2000 passed by the labour court, Amreli in Reference (LCA) No. 16 of 1998 whereunder the workmen herein were ordered to be made permanent with effect from 1.1.1991. However, the labour court has clarified that the workmen were not to be given any financial benefits arising out of the permanency granted with effect from 1.1.1991 and thus it has been ordered that the period from 1.1.1991 till the date of the decision be treated as notional.

During the course of hearing, learned advocate Mr. Munshaw appearing for the petitioner has submitted that industrial dispute was raised by the respondents about permanency and the labour court granted the same without considering the record which was produced by the petitioner. He has also submitted that the labour court has committed gross error in granting the benefit of permanency with effect from 1st January, 1991. He has submitted that in granting such benefits with effect from 1.1.1991, the labour court has saddled burden upon the petitioner which is a public body.

I have considered the submissions made by Mr. Munshaw, learned advocate for the petitioner. I have also perused the impugned award made by the labour court. It is required to be noted that before the labour court, the industrial dispute referred by the Deputy Labour Commissioner, Rajkot was as under :

> "Whether Shri S.K. Raijada and Shri S.B.Gatha should be made permanent with effect from the day on which they completed 240 days service and should be given all the benefits together with arrears which are available to the permanent employees or not ?"

Before the labour court, statement of claim was filed by the respondents workmen wherein it has been mentioned that both the respondents were appointed as driver with effect from 9th February, 1984 to 7th May, 1984 and, thereafter, they were continued as such without any break and even at present, they are working as daily wager in fixed salary and no benefits have been given to these two workmen and, therefore, statement of claim to that effect has been filed by the respondents. It is necessary to be noted that the petitioner has not filed

even reply to this statement of claim before the labour court. Second aspect required to be noted is that the respondent workmen have produced documents vide Exh. 15, 15/1 and 15/2 wherein two certificates were produced by the respondents which were issued by the petitioner in favour of the respondents. It is also required to be noted that the petitioner has not produced any documentary evidence before the labour court and thereafter, one of the respondent namely Mr. Raijada was examined before the labour court at Exh. 10 and his evidence was not cross examined by the petitioner and thereafter, right of the petitioner to make cross examination of the said witness has been closed. Before the labour court, witness Raijada has deposed in support of both the workmen and, thereafter, written arguments were submitted by the respondents workmen at Exh. 20 and, thereafter, the petitioner has argued the matter orally before the labour court. Thereafter, oral as well as the documentary evidence of the respondent Raijada was examined by the labour court and thereafter, the labour court has come to the conclusion that since 1984 both the workmen are working on the post of driver continuously without any break and the evidence of the workmen had remained unchallenged and, therefore, same was believed by the labour court. I have perused the entire award made by the labour court. There is no procedural irregularity committed by the labour court. Upon perusal of the impugned award, it does not appear that the labour court has committed any jurisdictional error which would require interference of this court in exercise of the powers under Article 226 and/or 227 of the Constitution of India. While granting relief in favour of the respondents workmen, the labour court has taken care to the effect that though direction has been issued to make the workmen permanent with effect from 1.1.1991, they were ordered to be considered permanent on notional basis with effect from 1.1.1991 till the date of the award i.e. for the period from 1.1.1991 till the date of the award, the petitioner has not been directed to make payment of any monetary benefits and therefore, according to my opinion, it is just and fair award made by the labour court and the petitioner has not been saddled with any financial liability for the period from 1.1.1991 till the date of the award. Therefore, there is no error committed by the labour court while passing such award. Recently, this Court has examined this issue in case of Amarsingh Madhavji Chauhan and State of Gujarat reported in 2002 (92) FLR 919. In para 4, 5 and 6 of the said decision, it has been observed by this Court as under :

4. I have considered the submissions of the learned advocates on behalf of the respective parties. Perusal of the material on record reveals that the petitioner who was appointed on 1st July, 1974 as daily wager at the rate of Rs. 4/- day and he remained in service upto 31st August, 1984. Thereafter, the services of the petitioner came to be terminated and said action which was challenged by the petitioner and ultimately, he succeeded before the Civil Court and even before the appellate forum and consequentially, the petitioner continued in services. These are undisputed facts which are on record. In light of these facts, when the petitioner is not receiving regular salary for the post of Watchman who is working since the year 1974 and he remained continued in service at the rate of Rs.4/- per day, which in clear terms, amounts to clear exploitation of the petitioner by the public authority. It is also pertinent to note that this petition is pending before this Court for more than 9 years, despite this also, the case of the petitioner has not been considered by the respondent authority for absorption of the petitioner or paying him regular salary to the petitioner. In above background of the facts, certain observations made by the Apex Court in case of CHIEF CONSERVATOR OF FOREST AND ANOTHER VS. JAGANNATH MARUTI KONDHARE reported in AIR 1996 SC 2898 are relevant with the facts of the case and therefore, observations made in para-12, 22 and 23, 28 and 29 are quoted as under :-

"12. We may not go by the labels, Let us reach the hub. And the same is that the dichotomy of sovereign and non-soverign functions does not really exist, it would all depend on the nature of power and manner of its exercise, as observed in para 23 of NAGENDRA RAO'S CASE [1994 Air SCW 3753]. As per the decision in this case, one of the tests to determine whether the executive function is sovereign in nature is to find out whether the State is answerable for such action in Courts of law. It was stated by Sahai, J. that acts like defence of the country, raising armed forces and maintaining it, making peace or war, foreign, affairs, power to

acquire and retain territory, are functions which are indicative or external sovereignty and are political in nature. They are, therefore, not amenable to the jurisdiction of ordinary civil court inasmuch as the State if immune from being used in such matters. But then, according to this decision the immunity ends there. It was then observed that in a welfare State, functions of the State are not only the defence of the country or administration of justice or maintaining law and order but extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. Because of this the demarcating line between sovereign and non sovereign powers has largely disappeared.

22. We have given out due thought to the aforesaid rival contentions and, according to us, the object of the State Act, inter alia, being prevention of certain unfair labour practices, the same would be thwarted or get frustrated if such a burden is placed on a workman which he cannot reasonably discharge. In our opinion, it would be permissible on facts of a particular case to draw the inference mentioned in the second part of the item, if badlis, casuals or temporaries are continued as such for years. We further state that the present was such a case inasmuch as from the materials on record we are satisfied that the 25 workmen who went to Industrial Court of Pune [and 15 to Industrial Court, Ahmednagar] had been kept as casuals for long years with the primary object of depriving them the status of permanent employees inasmuch as giving of this status would have required the employer to pay the workmen at a rate higher than the one fixed under the Minimum Wages Act. We can think of no other possible object as, it may be remembered that the Pachgaon Parwati Scheme was intended to cater to the recreational and educational aspirations

also of the populace, which are not ephemeral objects, but par excellence permanent. We would say the same about environment-pollution-care work of Ahmednagar, whose need is on increase because of increase in pollution. Permanency is thus writ large projects, persons are kept in jobs on casual basis for years the object manifests itself; no scrutiny is required. We, therefore, answer the second question also against the appellants.

23. The final point which needs our determination is regarding the reliefs granted by the Industrial Court, which is to make the workmen, in both the matters, permanent with all benefits of a permanent worker, which would include payment of wages etc. at the rate meant for a permanent worker.

28. In so far as the financial string on State exchequer is concerned, which submission is sought to be buttressed by Shri Dholakia by stating that in the Forest Department itself the casual employees are about 1.4 lacs and if all of them were to be regularized and paid at the rate applicable to permanent workmen, the financial involvement would be in the neighborhood of Rs.300 crores a very high figure indeed. We have not felt inclined to bear in mind this contention of Shri Dholakia as the same has been brought out almost from the hat. The argument relating to financial burden is one of despair or in terrorem. We have neither been impressed by the first nor frightened by the second inasmuch as we do not intend that the view to be taken by us in these applies should apply, proprio vigore, to all causal labourers of the Forests Department or any other Department of the Government.

29. We wish to say further that if Shri Bhandare's submission is taken to its logical end, the justification for paying even minimum wages could wither away, leaving any employer, not to speak

of model employer like the State, to exploit unemployed persons. To be fair to Shri Bhandare it may, however, be stated that the learned counsel did not extend his submission this far, but we find it difficult, to limit the submission of Shri Bhandare to payment of, say fair, wages, as distinguished from minimum wages. We have said so, because if a pay scale has been provided for permanent workmen that has been done by the State Government keeping in view its legal obligations and must be one which had been recommended by the State Pay Commission and accepted by the Government. We cannot deny this relief of permanency to the respondents workmen only because in that case they would be required to be paid wages meant for permanent workers. This right flows automatically from the relief of regularization to which no objection can reasonably be taken, as already pointed out. We would, however, observe that the relief made available to the respondents is not one which would be available ipso facto to all the casual employees either of the Forests Department or any other Department of the State. Claim of casual employees for permanency or for higher pay shall have to be decided on merits of their own cases.

5. Similarly, view taken by this Court in case of C.D. CHAUHAN & ORS. V RESERVE BANK OF INDIA AND ANOTHER reported in 32 [2] GLR pg 1192, wherein relevant Head Notes portion of para 4,5 and 7 are quoted as under :-

"In case of the petitioners it is stated that their names are sponsored by employment exchange, Ahmedabad. Their names were sent on the requisition of the Reserve Bank of India for the posts of Mazdoors which belong to Cl.IV in the service of the Bank. Persons desirous of being employed were required to submit their application in the prescribed application form and such application for inter alia required details regarding age, educational qualifications, previous

> experience etc. pursuant to such applications candidates were called for personal interview and based on their age, educational qualifications and performance at the personal interview they were selected for being wait listed for the post of Tikka Mazdoors and after their selection they were called upon to undergo medical fitness examination, and after they have been found medically fit they were wait listed in the waiting list of daily wage mazdoors. [para-4]

The question that arises is as to how daily wage [tikka] Mazdoors are differently or adversely situated, vis-a-vis, regularly employed Mazdoors of the respondent - Bank. Is mode of their recruitment different ? Are qualifications prescribed for the post different ? Are daily wage Mazdoors in any way ineligible or disqualified for being absorbed as regular mazdoors ? Are they rejected by any selection committee in the process of selection ? These few questions require to be answered, and the very mode of recruitment [stated in paragraph 4] makes it clear that the answer to all the questions is in the negative. The daily wage [tikka] mazdoors should possess the minimum educational qualification, namely Standard IV to VII passed and the petitioners when they applied for the post of daily wage [tikka] mazdoors did possess that qualification. The educational qualification for the post of regular mazdoor is not stated to be different. On the date of their application or their initial recruitment they were not overaged. They are not in any manner found to be ineligible inasmuch as the selection committee has selected them. In fact they have been wait listed and they have been continuously offered work on daily wage basis since 1984 till the date they filed the petition. Even after filing of this petition they have been offered work on daily wage basis as tikka mazdoors. [para-5]

There is no justification for denying regular appointment to the petitioners for the post of regular mazdoors. When the petitioners and other identically situated persons were enlisted to work as daily wage mazdoors after undergoing due selection process there was no justification in

denying to them the post of regular mazdoors. When the Reserve Bank tried to fill in the posts of regular mazdoors in its regular establishment by giving fresh advertisement and by preparing list of 120 persons in total disregard of the claims of the petitioners for such posts, petitioners knocked the doors of this Court for justice." [para-7]

6. Recently, the Apex Court has also considered this aspect of regularization in service and also as regular pay scale to such daily wager employees in case of GUJARAT AGRICULTURAL UNIVERSITY V. RATHOD LABHU BECHAR reported in AIR 2001 SC 706. Relevant observations made in para-18, 19 and 30 are quoted as under :-

"18. What emerges is, all the respondent workmen are eligible for absorption on the facts of this case subject to any eligible qualification under the rule if any. Though no recruitment rules were filed in the proceedings either before the Tribunal or in the High Court but while proposing the scheme a copy of the recruitment rules for various cadres have been placed before us on behalf of the appellant University. This gives in column No.1 the serial No., in Column No.2 the name of the post, in column No.3 the pay scale, in column No.4 the age limit and in column NO.5 the qualification, serial No.10 deals with Peon and Class IV servants, serial No.13 deals with Operator-cum Mechanic, Serial No.14 deals with Chowkidar, Serial No.25 deals with Plumber and Serial No.33 deals with Carpenter. This shows that recruitment rules did have these post in its ambit about which we are concerned, yet no posts were created. This proposed creation of post is churned out only after this long battle by the workmen as against the appellant. It was not expected from the institutions like the present appellant, especially when it si fully funded by the State Government that this process of absorption should have

taken such a long time and to have yielded to it only after this long battle. This legal position is well known not only to the appellant but the State who is funding it, then why to do it only after Courts' intervention. It is true creation of post does involved financial implication. Hence financial health of a particular institution plays important role to which Courts also keep in mind. The Court does exercise its restrain where facts are such where extent of creation of post creates financial disability. But at this juncture we would like to express our note of caution, that this does not give largess to an institution to engage larger number of daily wage workers for long number of years without absorbing them or creating posts which constitutes an unfair labour practice. If finances are short engagement of such daily wage workers could only be for a short limited period and if continuous work is required it could only do so by creating permanent post. If finances are not available, take such work which is within financial mean. Why take advantage out of it at the cost of workers.

"19. One of the questions which is also up for our consideration is, apart from the fact who are to be regularize, what would be payable to these daily wage workers who have completed more than 10 years of continuous service. Submissions for the respondents is, that such daily wage workers should be paid the same minimum scale of pay as admissible to the regularized incumbent based on the principle of `equal pay for equal work' Daily rated casual labour employed under P & T Department through Bhartiya Dak Tar Mazdoor Manch V. Union of India [AIR 1987 SC 2342 : 1988 Lab IC 37] [Supra] was a case of daily rated casual labourers of the P & T department doing work similar to that of the regular workers of the department. This Court held :

" ..... Even though the Directive Principle contained in Articles 38 and 39 [d] may not be enforceable as such be virtue of Article 37 but it may be relied upon by the petitioners to show that in the instant case they have been subjected to hostile discrimination. The State cannot deny at least the minimum pay in the pay scales of regularly employed workmen even though the Government may not be compelled to extend all the benefits enjoyed by regularly recruited employees. Such denial amounts to exploitation of labour. The Government cannot be take advantage of its dominant position and compel any worker to work even as a casual laborer on starvation wages. It may be that the casual laborer has agreed to work on such low wages ..... "

30. According to the State counter if absorption is made from 1-1-1993 of all those who have completed ten years of service as per Tribunal order, the payment towards arrears would be to the tune of 15 crores. Since in the proposed scheme, absorption is from 1st January, 2001, the State has already gained much more than this arrears of more than 15 crores. In this light and in the absence of details being placed before us, we are leaving the extent of creation of the posts on the State Government. We hope and trust, the Government who is the guardian of the people and is obliged under Article 38 of the Constitution, to secure a social order for the promotions of welfare of the people, to eliminate inequalities in status, will endeavour to give maximum posts even at the first stage of absorption, and DDO the same in the same spirit for creating additional posts after enquiry as we are indicating hereunder. It is necessary that the State Government to set up an enquiry to find what further number of additional posts are required for regularizing such other daily rated workers, and after assessing it, to create such additional posts for their absorption. This

exercise should be done by the State Government within a period of six months. The submission on behalf of the respondent is that those who are not regularized and are continuously working for 10 or more years with minimum of 240 days in each calender year, they should be paid minimum pay scale as admissible to an incumbent regularized on similar post doing similar work instead of minimum wages as prescribed by the Government. The dispute thus is, whether such workers to be paid minimum daily wage as Government prescribes as per the scheme or pay them the minimum pay scale admissible to such regularized worker without increment and other benefit. This Court in one set of decisions have said to regularize them in one block and pay them the same minimum pay scale as admissible to a regular employee as in; Surinder Singh Vs. Engineer-in-Chief, C.P.W.D., 1986 [1] SCC 639 " [AIR 1986 SC 584 : 1986 Lab IC 551], U.P. Income Tax Department Contingent Paid Staff Welfare Association v. Union of India, [1987] Supp SCC 658 : [AIR 1988 SC 517 : 1988 Lab IC 958], 1998 State of Punjab v. Devinder Singh, 1998 [9] SCC 595, Chief Conservator of Forests v. Jagannath Maruti Kondhare, 1996 [2] SCC 293 : [1996 AIR SCW 735 : AIR 1996 SC 2898 : 1996 Lab IC 967] and in other cases to absorb in a phased manner under a scheme which depends on the facts of each case. In Mool Raj Upadhayaya v. State of H.P. [1994 Supp [2] SCC 316] [Supra], this Court approved a scheme under which the daily wage workers whether skilled or unskilled who have not completed 10 years of service was to be paid daily wage at the rates prescribed by the Government of H.P. from time to time for daily wage employees falling under Class III and IV till they are appointed regularly. Strong reliance is placed on behalf of the University on this case and also, looking to the fact that it has not impressive source of its own, being an Agricultural University, depending on the State fund, we hold they

should be paid minimum wages as prescribed by the Government from time to time as proposed under the scheme. We approve both clauses 2 and 3 on the facts and circumstances of this case. In fact, in seeking minimum pay scale to such daily rated workers as admissible to a regular employee is based on the principle of `equal pay for equal work'. It is pertinent to refer, in this case the observations of the High Court :

".... Workmen are not claiming equal pay for equal work but they are claiming permanent status as Class IV employees as they are working and have gained more than sufficient experience in their work ... "

Therefore, in view of the observations made by this Court considering the decision of the apex court, and also according to my opinion, in the facts and circumstances of the case, the labour court was right in passing the award in question. Mr. Munshaw has not been able to point out any jurisdictional error and/or material irregularity or procedural irregularity committed by the labour court. Therefore, there is no substance in this petition and is required to be dismissed.

For the reasons recorded hereinabove, this petition is dismissed. Rule is discharged. Ad.interim relief, if any, shall stand vacated with no order as to costs.

16.3.2002. [H.K. Rathod,J.]

Vyas